

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ENRIQUE REYES,

Defendant and Appellant.

B214384

(Los Angeles County
Super. Ct. No. BA324849)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Stephen A. Marcus, Judge. Affirmed.

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and Catherine Okawa Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Enrique Reyes appeals from a judgment entered after the jury convicted him of count 1, first degree murder (Pen. Code, § 187, subd. (a)),¹ and count 2, carjacking. (§ 215, subd. (a).)

The trial court sentenced appellant to state prison for 25 years to life as to count 1. The trial court stayed the sentence on count 2 pursuant to section 654.

We affirm.

CONTENTIONS

Appellant contends that: (1) the trial court abused its discretion when it refused to allow defense counsel to ask the defense expert a hypothetical question; (2) the trial court abused its discretion by refusing to permit the defense expert to testify why appellant's school records did not contain his IQ scores; (3) the trial court improperly failed to instruct the jury with CALJIC No. 2.02 and a pinpoint instruction regarding appellant's intent; and (4) the prosecutor committed misconduct during closing argument.

FACTS AND PROCEDURAL BACKGROUND

Viewing the evidence in the light most favorable to the judgment as we must (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138–1139), the evidence established the following.

On June 17, 2007, at about 3:45 a.m., appellant and his friend Miguel Salazar approached Rene Aguilar, who was passed out in a car in the parking lot of a strip mall. Salazar told appellant that he wanted to steal Aguilar's car so he could sell the parts. Salazar asked appellant to pull Aguilar out of the car and start a fight. Appellant walked up to the driver's side door, opened the door, took out the keys, and tried to pull Aguilar out of the car. Aguilar struggled and the two began to punch each

¹ All further statutory references are to the Penal Code unless otherwise indicated.

other and wrestle. Salazar entered the car from the passenger side and moved into the driver's seat. He then told appellant to get into the car. Appellant entered the car through the passenger side. Aguilar walked to the passenger side and tried to open the door. Salazar put the car in reverse and hit Aguilar, knocking him to the ground. Salazar then drove forward and ran over Aguilar. Salazar drove three or four blocks. Appellant got out of the car and returned to the parking lot.

Aguilar died as a result of blunt force trauma which caused injuries to his internal organs. Aguilar sustained two lacerations to his scalp, abrasions on the back of his shoulder, a tire mark on the lower abdomen, fractures of the arms, a severe crushing injury of the rib cage, a crushing injury of the pelvis, bleeding of the internal organs, and large lacerations of the right lung.

On June 19, 2007, Aguilar's car was found a few blocks away from the crime scene with its stereo removed. A security camera located in the strip mall's laundromat recorded appellant and Salazar as they accosted Aguilar and stole his car. The videotape showed Aguilar holding his head after the struggle and prior to being run over. A club locking device and a screwdriver were found in the parking lot where the crimes occurred.

On June 26, 2007, as Vera Herrera was speaking to a neighbor about the crime, appellant approached and asked if the victim had died. When she responded that he had, appellant smiled or laughed and said, "Good," and walked away. That same day, appellant banged on the door of the strip mall laundromat. The manager of the laundromat, Jose Madrigal, opened the door and appellant asked him if he had told the police that appellant had robbed or stabbed anyone with a screwdriver. When Madrigal told appellant that he had not called the police, appellant said he did not care and could stab him too. Later that day, Los Angeles Police Department Detective Rogelio Sandoval approached appellant as he stood near the crime scene. Appellant voluntarily stated that he knew the police were looking for him and said "Look, I'm

not going down for killing that guy. I was just the passenger. The other guy ran the guy over. I was just the passenger.”

After he was advised of and waived his rights under *Miranda v. Arizona* (1966) 384 U.S. 436, appellant gave two versions of the murder to police officers. In the first, he stated that Salazar told him he needed appellant’s help in getting his drunken friend out of the car. In the second he stated that Salazar asked him to help him steal a car from a man who was passed out. He said that Salazar wanted to sell the car for its parts. Appellant returned to the crime scene but did not call the police because he was afraid that Aguilar was dead. Appellant did not realize that Salazar was going to kill Aguilar. Appellant’s statements were tape-recorded and played to the jury.

DISCUSSION

I. The trial court did not abuse its discretion when it limited the defense’s questioning of the defense expert

Appellant contends that the trial court abused its discretion when it refused to allow defense counsel to ask a neuropsychologist defense expert a hypothetical question regarding a seven or eight-year-old child. He contends the hypothetical did not go to the ultimate issue in the case, namely, whether appellant harbored the specific intent to commit the carjacking. We disagree.

Pursuant to section 28: “Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.”

Section 29 provides: “In the guilt phase of a criminal action, any expert testifying about a defendant’s mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states,

which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact.” “Rulings under this statute are reviewed for abuses of discretion.” (*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1327.)

At trial, defense counsel examined defense expert witness Dr. Roger Light, a clinical neuropsychologist. Dr. Light testified that appellant’s IQ was between 63 and 66, which is in the range of mild mental retardation. He opined that appellant had a mental age similar to that of a child between six and nine years old. Dr. Light testified that people with limited IQs have deficient planning, organizational, and decisionmaking skills. They may also have behavioral problems. Defense counsel then posited the following hypothetical: “You have a child approximately the age of seven or eight years old who is on a playground at school. We’ll call that Child A. Child A sees Child B with a toy in hand, and Child A wants that toy. Also assume for the purposes of this hypothetical that Child A decides that he wants to take the toy from Child B.”

At that point, the trial court requested the parties to approach the bench, and after some discussion determined that the hypothetical was improper because it would elicit an opinion from Dr. Light regarding appellant’s specific intent, which was prohibited under section 29. Defense counsel then resumed her questioning of the expert witness, who testified that appellant’s judgment and ability to make good decisions was affected by his impairment.

We find that the trial court could reasonably conclude that the hypothetical question was proscribed by section 29. Defense counsel “was simply planning by means of the hypothetical to do indirectly what he could not do directly under the statute,” that is, eliciting an opinion from an expert witness as to the defendant’s specific intent. (*People v. Bordelon, supra*, 162 Cal.App.4th at p. 1327.) “Section 29 ‘does not simply forbid the use of certain words, it prohibits an expert from offering an

opinion on the ultimate question of whether the defendant had or did not have a particular mental state at the time he acted.”” (*Ibid.*) But, appellant contends that his mild retardation was not equivalent to a mental illness, mental defect or mental disease under sections 28 and 29. We disagree. Section 29 was enacted to “eliminate diminished capacity as a defense and to disallow experts to testify to the ultimate fact of a defendant’s mental state.” (*People v. Whitler* (1985) 171 Cal.App.3d 337, 341.) Mental retardation, organic brain damage, and paranoid psychosis have been categorized as a mental disorder. (*People v. Smithey* (1999) 20 Cal.4th 936, 959.)

Appellant further contends that sections 28 and 29 did not prohibit Dr. Light from opining about a child’s understanding of the concepts of impermanence, deprivation of property, and the consequences of his actions. He contends that the hypothetical question was designed to elicit Dr. Light’s opinion on whether a hypothetical child could understand the nature of the taking, rather than on whether appellant had the requisite specific intent for the charged crimes. But, appellant’s citation to *People v. Gonzalez* (2006) 38 Cal.4th 932, 946–947, where the trial court held that an expert may testify about the culture and habits of criminal street gangs, is of no assistance to him. Rather, defense counsel’s questions were designed to elicit Dr. Light’s opinion on appellant’s intent by drawing parallels to a six or seven-year-old child. “An expert may not evade the restrictions of section 29 by couching an opinion in words which are or would be taken as synonyms for the mental states involved. Nor may an expert evade section 29 by offering the opinion that the defendant at the time he acted had a state of mind which is the opposite of, and necessarily negates, the existence of the required mental state.” (*People v. Nunn* (1996) 50 Cal.App.4th 1357, 1364.) Thus, a hypothetical disguised to elicit expert opinion that the defendant had acted impulsively, without intent to kill, was improper. (*Id.* at p. 1365.) Similarly, a hypothetical designed “[t]o ask whether a hypothetical avatar in defendant’s circumstances would have had the specific intent required for robbery, . . . as counsel appeared to be proposing, would have been the functional

equivalent of asking whether defendant himself had that intent.” (*People v. Bordelon*, *supra*, 162 Cal.App.4th at p. 1327.)

We are satisfied that the trial court did not abuse its discretion by refusing to allow defense counsel to ask the hypothetical question. In any event, any error in excluding the hypothetical was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Dr. Light was able to testify extensively about appellant’s test results. He opined that appellant was mentally retarded and had limited decisionmaking ability. The evidence was strong that appellant intended to commit the carjacking by the assistance he rendered to Salazar as caught on videotape, and by the comments made to the prosecution witnesses. From this evidence the jury could reasonably draw the inference that appellant intended to commit the carjacking.

II. The trial court did not abuse its discretion by refusing to permit the defense expert to testify that appellant’s school records did not contain his IQ scores because of a lawsuit brought by an African-American child

Appellant contends that the trial court abused its discretion by refusing to permit Dr. Light to testify that appellant’s school records did not contain his IQ scores because of a lawsuit brought by an African-American child. We disagree.

To be admissible, evidence must be relevant. (Evid. Code, § 350.) Relevant evidence “means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) The trial court has broad discretion in determining the relevance of evidence as well as determining whether to admit expert testimony. (*People v. Lindberg* (2008) 45 Cal.4th 1, 45.) “If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and [¶] (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made

known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates” (Evid. Code, § 801.)

Although Dr. Light’s opinion that appellant is mentally retarded was relevant to the material issues in the case, namely, appellant’s mental capacity, he was not an expert in the area of LAUSD recordkeeping. As admitted by appellant, Dr. Light “testified in depth regarding appellant’s IQ, his mental retardation, and his cognitive and intellectual deficits.” The record shows Dr. Light further testified that appellant was given an IQ test when he “was about seven or eight.” But, the trial court properly refused to allow Dr. Light to testify why IQ test results were not permitted in LAUSD files because Dr. Light was not qualified as a custodian of records or expert on the creation of LAUSD school records.

Furthermore, despite appellant’s assertions on appeal that “[t]he information on the changed school district policy was part of Dr. Light’s knowledge and background in appellant’s case” and “[i]t also helped Dr. Light form his opinions in appellant’s case,” the reason for the lack of a test score in appellant’s school records was not relevant to the formation of Dr. Light’s opinion. Dr. Light testified that there were no IQ test scores in appellant’s school records and that the lack of the scores did not affect his opinion that appellant is mentally retarded. He also testified that he disagreed with the LAUSD diagnosis that appellant was emotionally disturbed. He opined that the school records included limited evaluations because appellant’s IQ had not been tested. Appellant’s further argument that a school record of appellant’s IQ would have supported Dr. Light’s findings of mental retardation is mere speculation.

We find that the trial court did not abuse its discretion in refusing to permit the challenged testimony. In any event, there is no reasonable probability that the verdict would have been different had the information on the school district’s policy on IQ scores been admitted. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Dr. Light was able to present extensive testimony on the tests that he administered to appellant, his

opinion about appellant's deficiency in decisionmaking and judgment, his opinion that appellant was mentally retarded, and the basis for his opinion. But, the evidence was strong that appellant intended to commit the carjacking through his own statements to the police, to other witnesses, and through video evidence. From the evidence the jury could conclude that appellant possessed the requisite mental state.

III. The trial court adequately instructed the jury on intent

Appellant contends that the trial court erred when it refused to instruct with CALJIC No. 2.02 and a pinpoint instruction regarding specific intent and mental impairment with respect to the carjacking charge. We disagree.

A trial court must instruct on “the general principles of law relevant to and governing the case.” (*People v. Rubalcava* (2000) 23 Cal.4th 322, 333–334.) Relevant law includes instructions “regarding the intent necessary to commit the offense and the union between that intent and the defendant's act or conduct.” (*People v. Alvarado* (2005) 125 Cal.App.4th 1179, 1185.) In order to find appellant guilty of carjacking, the People had to prove: (1) a person had possession of his car; (2) the car was taken from his person or immediate presence; (3) the car was taken against his will; (4) the taking was accomplished by means of force or fear; and (5) the person taking the vehicle had the specific intent to either permanently or temporarily deprive the person in possession of the car of that possession. (§ 215; CALJIC No. 9.46.)

CALJIC No. 2.01² instructs the jury that a finding of guilt may be based on circumstantial evidence if the circumstances are consistent with the theory that the

² CALJIC No. 2.01 provides: “However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion. [¶] Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be

defendant is guilty of the crime and cannot be reconciled with any rational conclusion. CALJIC No. 2.02,³ on the other hand, instructs that specific or mental state may be shown by circumstantial evidence if the circumstances are consistent with the theory that the defendant is guilty of the crime and cannot be reconciled with any rational conclusion.

“CALJIC No. 2.02 was designed to be used in place of CALJIC No. 2.01 when the defendant’s specific intent or mental state is the only element of the offense that rests substantially or entirely on circumstantial evidence.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 341.) CALJIC No. 2.01 is the more inclusive instruction on sufficiency of circumstantial evidence. (*People v. Marshall* (1996) 13 Cal.4th 799, 849.) As noted by the trial court, the use notes to CALJIC No. 2.02 state that CALJIC

proved beyond a reasonable doubt. [¶] Also, if the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to the defendant’s guilt and the other to [his] [her] innocence, you must adopt that interpretation that points to the defendant’s innocence, and reject that interpretation that points to [his] [her] guilt. [¶] If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.”

3 CALJIC No. 2.02 provides: “The [specific intent] [or] [and] [mental state] with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not [find the defendant guilty of the crime charged [in Count[s] ____, ____, ____ and ____], [or] [the crime[s] of ____, ____, ____, which [is a] [are] lesser crime[s],] [or] [find the allegation to be true,] unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required [specific intent] [or] [and] [mental state] but (2) cannot be reconciled with any other rational conclusion. [¶] Also, if the evidence as to [any] [specific intent] [or] [mental state] permits two reasonable interpretations, one of which points to the existence of the [specific intent] [or] [mental state] and the other to its absence, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the [specific intent] [or] [mental state] appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.”

No. 2.01 and CALJIC No. 2.02 are alternative instructions and if circumstantial evidence relates to other matters or to other matters as well a specific intent or mental state, CALJIC No. 2.01 should be given and not CALJIC No. 2.02. (Use Note to CALJIC No. 2.02 (Spring 2010 Ed.); *People v. Burch* (2007) 148 Cal.App.4th 862, 871, fn. 3 [citing Use Note to CALJIC No. 2.02].)

We find that the trial court did not err by instructing with CALJIC No. 2.01 because the prosecutor's case against defendant depended on circumstantial evidence related to matters other than specific intent or mental state. Appellant's conversation with Herrera and his conduct at the laundromat in banging on the door, asking Madrigal if he had reported appellant to the police, and threatening Madrigal constituted circumstantial evidence of appellant's specific intent. Additionally, the pathologist testified that Aguilar sustained two lacerations to his scalp. Therefore, the screwdriver and a club locking device found in the parking lot where the carjacking took place constituted circumstantial evidence that the crime was committed and that the perpetrators used force.

Next, we find that the trial court did not err in refusing to instruct with a pinpoint instruction regarding specific intent. A defendant has a right to instructions that pinpoint the theory of his defense. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142.) But, a trial court is not required to give a pinpoint instruction if it duplicates other instructions. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 220.) During discussions on jury instructions, the trial court agreed to instruct the jury with CALJIC No. 2.71.7 as follows: "Evidence has been received from which you may find that an oral statement of intent, plan, motive, [or] design was made by the defendant before the offense with which he is charged was committed. It is for you to decide whether the statement was made by the defendant. Evidence of an oral statement ought to be viewed with caution." Defense counsel then requested the pinpoint instruction that "if this jury has a reasonable doubt as to whether or not [appellant] had the specific intent to permanently or temporarily deprive Rene Aguilar of his vehicle, they must find him

not guilty.” The trial court refused, finding that the requested pinpoint instruction duplicated CALJIC No. 3.32, which stated: “You have received evidence regarding a mental disease, mental defect, or mental disorder of the defendant at the time of the commission of the crime charged namely, carjacking in count 2. You should consider this evidence solely for the purpose of determining whether the defendant actually formed the required specific intent which is an element of the crime charged in count 2, namely, Carjacking.” The trial court also instructed with CALJIC No. 2.01 that “each fact which is essential to complete a set of circumstances necessary to establish the defendant’s guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.” Therefore, the requested instruction duplicated the instructions given by the court.

We are satisfied that the trial court did not abuse its discretion in refusing defense counsel’s request to instruct with the requested pinpoint instruction and instead instructing with CALJIC Nos. 3.32 and 2.01.

IV. The prosecutor did not commit prejudicial misconduct

Appellant contends that the prosecutor committed misconduct during his closing argument with respect to: Herrera’s recorded statement, Dr. Light’s testimony that appellant had been fired from a job for stealing, and Dr. Light’s diagnosis of appellant’s mental retardation. While it is true that the prosecutor did make misstatements, we find that they were trivial, that the trial court immediately sustained defense counsel’s objections, and that any misconduct was harmless in light of the admonitions and instructions provided.

“Prosecutors have wide latitude to discuss and draw inferences from the evidence at trial. [Citation.] Whether the inferences the prosecutor draws are reasonable is for the jury to decide. [Citation.] Harsh and vivid attacks on the credibility of opposing witnesses are permitted, and counsel can argue from the

evidence that a witness's testimony is unsound, unbelievable, or even a patent lie. [Citation.] Although defendant singles out words and phrases, or at most a few sentences, to demonstrate misconduct, we must view the statements in the context of the argument as a whole. [Citation.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) A prompt objection and request for admonition can readily cure the supposed misconduct. (*Id.* at p. 520.)

Appellant contends that the prosecutor committed misconduct during closing argument when he briefly referred to a recorded statement made by Herrera to the police that had not been introduced into evidence. The record shows that the prosecutor stated that appellant walked up to Herrera, asked if Aguilar had died, said "good," then either laughed or smiled. The prosecutor then stated that Herrera's statement had been recorded. It is true that the prosecutor is generally precluded from vouching for the credibility of her witnesses, or referring to evidence outside the record to bolster their credibility or attack that of the defendant. (*People v. Anderson* (1990) 52 Cal.3d 453, 479, overruled on other grounds in *People v. Triplett* (1993) 16 Cal.4th 64, 68–69.) But, the record shows that defense counsel immediately objected that the evidence was outside the record. The trial court sustained the objection and stated "that's not evidence in the case." At sidebar, the trial court stated that the prosecutor should have introduced the recording and transcript if he intended to refer to it in closing argument. The trial court denied trial counsel's request to instruct the jury to disregard the prosecutor's last statement, because the objection had been sustained. We find that the misconduct was cured by the trial court's order sustaining the objection. Furthermore, in light of the brief nature of the remark, there is no reasonable probability that the outcome would have differed had the jury not heard the statement. (*People v. Ochoa* (1998) 19 Cal.4th 353, 466.)

Appellant additionally asserts that during rebuttal, the prosecutor incorrectly stated that Dr. Light had testified that appellant had been fired from a job for stealing. Defense counsel objected on the basis that allegations of stealing were not in evidence.

The trial court initially stated that it believed the information was in evidence, but after a sidebar and break during which Dr. Light's testimony was reviewed, informed the jury that the objection by the defense was sustained. Upon resuming rebuttal, the prosecutor stated that both he and defense counsel would argue facts they believe were presented, but that the jury should focus on the facts and law as the jury recalled them. Here again, we find that the misconduct was minimal, and was cured when the trial court sustained defense counsel's objection.

Appellant also takes issue with the prosecutor's argument that appellant's school records did not indicate he was mentally retarded. He contends that the argument was unfair because the prosecutor knew that the school district could not diagnose appellant as retarded. But the prosecutor's argument was properly based on the evidence and he did not substantially misstate the facts or go beyond the record. We find the prosecutor did not employ deceptive or reprehensible methods to persuade the jury. (*People v. Dennis, supra*, 17 Cal.4th at p. 522.)

In addition, appellant contends that the prosecutor unfairly argued in rebuttal that Dr. Light had testified that "IQ testing is unreliable after the age of 18." The record shows that immediately after the prosecutor made that statement, defense counsel objected on the basis that the argument misstated the testimony. The trial court stated that it would "let [the jury's] recollection be controlling on that." The prosecutor then stated that the jury could request that the court reporter read back the doctor's testimony. Our review of the record shows that Dr. Light actually testified that a developmental disability shows up early, before the age of 18. He opined: "After about age eight, IQ scores tend to stabilize. Before that they're not too reliable. From eight on, you expect someone to have a very similar IQ from that time going forward." Thus, it is clear that the prosecutor misstated Dr. Light's testimony, but we find that the misstatement was not repeated or egregious. The jury was immediately admonished that its recollection was controlling, and was instructed that the statements

of counsel are not evidence. It is presumed that the jurors understood and followed the instructions. (*People v. Young* (2005) 34 Cal.4th 1149, 1214.)

Appellant further contends that the prosecutor opened his rebuttal argument by improperly arguing that there was no evidence or witness testimony that appellant did not have specific intent. Defense counsel objected and at sidebar the trial court told the prosecutor that specific intent is always proved through circumstantial evidence. The trial court rejected defense counsel's request for a special instruction, stating "You made arguments about the D.A.'s process of filing cases. That wasn't proper. That was not evidence in this case. He's done the same thing. I sustained both. And those are not proper arguments, and they won't be allowed." The trial court then admonished the jury to disregard the last argument. While the prosecutor's statement was clearly inappropriate, we are satisfied it was not a deceptive or reprehensible method that rose to the level of misconduct. (*People v. Dennis, supra*, 17 Cal.4th at p. 522.) Both the prosecutor and defense counsel mounted vigorous attacks on the opposition's evidence and argument. Defense counsel argued that appellant was not capable of forming the requisite intent while the prosecutor argued that appellant's actions clearly demonstrated that he had the requisite intent when he committed the charged crimes. As previously discussed, the jury was properly instructed on intent and that statements of counsel are not evidence. We presume the jury followed the instructions. (*People v. Young, supra*, 34 Cal.4th at p. 1214.)

We find that most of the challenged statements were cured by admonishment or instruction. The prosecutor's remarks that misstated the evidence did not amount to an egregious pattern of conduct that rendered the trial fundamentally unfair in denial of appellant's federal constitutional right to due process of law. (*People v. Smithey, supra*, 20 Cal.4th at p. 961.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST